In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1471

CIVIC TELECASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 523 F.2d 1185. The Memorandum Opinions and Orders of the Commission (Pet. App. 10a-43a) are reported at 46 FCC 2d 1075; 46 FCC 2d 1099. The Memorandum Opinions and Orders denying reconsideration (Pet. App. 44a-52a) are reported at 48 FCC 2d 669; 48 FCC 2d 693.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1975. A petition for rehearing and suggestion of rehearing *en banc* was denied by orders of January 8, 1976. A petition for a writ of certiorari was first filed on February 25, 1976, but the Clerk

returned it because it did not comply with this Court's Rules.[1] The petition was refiled on April 13, 1976, and docketed as of February 25, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 309 of the Communications Act of 1934, the Federal Communications Commission must conduct an investigation or hold a hearing when a petition to deny an application fails to raise substantial and material questions of fact indicating that the granting of the application would be inconsistent with the public interest, convenience and necessity, and the Commission has no reason to believe that a hearing may develop evidence of such inconsistency.

STATEMENT

In 1971 petitioner Civic Telecasting Corporation filed with the Federal Communications Commission a petition to deny the license renewal applications of Carter Publications, Inc., the A.H. Belo Corp., and the Times-Herald Printing Co., licensees operating radio and television stations in the Fort Worth/Dallas metropolitan area.[2] The petition to deny contended that the licensees had conspired to obstruct CATV and UHF television development in the Fort Worth/Dallas area and engaged in anticompetitive practices injurious to the public interest (Pet. App. 19a-34a). At that time, petitioner's principals (through another corporation) were plaintiffs in a pending

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[1]The tendered petition was not signed by a member of the Bar of this Court, and was not printed in accordance with Rule 39 of the Supreme Court Rules.

[2]Petitioner later filed a petition to deny the applications covering Carter's assignment of its licenses to other parties.

BLEED THROUGH

antitrust suit against Belo and Times-Herald in which Carter was later named as a co-conspirator (Pet. App. 12a-13a).

The licensees denied in detail all of the allegations in the petition to deny. In its response, petitioner informed the Commission that it had obtained information supporting its allegations through discovery in its principal's antitrust litigation against the licensees, but that it was precluded by court order from disclosing that information to the Commission. Since it appeared to the Commission that petitioner had been unduly inhibited from perfecting its responsive pleading, the Commission deferred action on the petition in order to explore various alternatives for permitting petitioner to use the protected information to perfect its pleadings (Pet. App. 8a-9a, 13a-14a).

Subsequently, Carter and Times-Herald obtained the removal of any judicial restraints covering the use of information discovered from them. Belo still desired to preserve the confidential nature of certain material discovered from it, but represented that it would interpose no objection to petitioner's use of the material before the Commission (Pet. App. 15a-16a). Concluding that petitioner was no longer restrained from presenting to it the information allegedly discovered in the antitrust suit, the Commission directed petitioner to perfect its response. When petitioner expressed fear that some of the information was still covered by court protective orders, the Commission directed petitioner to come forward with the information it thought it could safely disclose, and allowed it the alternative of identifying any documents which it felt remained subject to judicial disclosure prohibitions (Pet. App. 16a-17a). Petitioner declined to follow either alternative.

In these circumstances, the Commission found that petitioner's unwillingness to perfect its response—even to the extent of identifying the allegedly relevant information and appropriate protective order—was unreasonable. Since it appeared that petitioner had no additional information which might reflect on the licensees' qualifications, the Commission determined that the proceeding should be resolved on the pleadings before it (Pet. App. 16a-18a).

In a detailed analysis of the pleadings, the Commission concluded that petitioner had "not raised substantial and material questions of fact which establish a *prima facie* case for denial of the * * * license renewal applications" (Pet. App. 30a), and that an evidentiary hearing therefore was not warranted. It denied the petitions to deny and granted the license renewal and assignment applications (Pet. App. 19a-43a). Although petitioner sought reconsideration, its petitions for reconsideration presented no new information and were denied (Pet. App. 44a-52a).

The court of appeals affirmed. Discussing first the procedural question, it agreed with the Commission that most of the previously protected evidence had been released for use by petitioner in the renewal proceedings, that petitioner had made no timely effort to seek clarification from the trial court as to what, if any, material might still not be disclosed, and that petitioner presented no reasonable basis for its failure at least to identify the relevant documents and the protective order prohibiting their disclosure (Pet. App. 4a). The court therefore concluded that the Commission's determination to act on the pleadings, after petitioner refused to comply with the requirements for specific allegations of fact supported by affidavits prescribed by Section 309(d) of the Communications Act, reflected a proper regard for protecting

BLEED THROUGH

the "interests of orderly administration and finality" (Pet. App. 4a-6a). Turning to the merits of the Commission's decision to renew the licenses, the court held that the Commission's detailed analyses rejecting petitioner's claims were "clearly not unreasonable in light of the evidence presented," and that the Commission had "accurately determined that there were no substantial and material issues requiring a hearing" (Pet. App. 7a).

ARGUMENT

The decision of the court of appeals is correct and presents no question of general importance requiring review by this Court.

As noted by the court of appeals (Pet. App. 1a-2a), petitioner's primary contention is that the Commission must conduct its own investigation or hold a hearing even when a petition to deny fails to present sufficient facts to indicate that renewal would not serve the public interest, convenience and necessity.[3] There is no statutory or decisional support for this contention. As the court of appeals pointed out, this broad duty would "not only place an impossible burden on the FCC but it would also contravene the license renewal procedures outlined in the Communications Act and the regulations promulgated thereunder [47 C.F.R. 1.580(i)]" (Pet. App. 5a) (citation omitted).

Section 309(d) of the Communications Act, 47 U.S.C. 309(d), plainly requires that a petition to deny a license renewal application must contain specific allegations of fact, supported, except where official notice may be taken, by affidavit of a person or persons with personal knowledge thereof, sufficient to show that a grant of the application would be *prima facie* inconsistent with the

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[3]The petition does not contend that the petition to deny presented sufficient facts to require an evidentiary hearing.

public interest. The license may be renewed without a hearing, upon a determination by the Commission "that there are no substantial and material questions of fact and that a grant of the application would be consistent with" the public interest, convenience and necessity. Section 309(d)(2), 47 U.S.C. 309(d)(2). Congress intended to place the burden of showing facts justifying a hearing on the party opposing renewal. This is made manifest by the legislative history accompanying the 1960 amendment which gave Section 309(d) its present form. 74 Stat. 889. That history unmistakably reflects an intent to require a substantially stronger showing, of greater probative value, than was necessary under the former statutory procedure. S. Rep. No. 690, 86 Cong., 1st Sess. 3 (1959); *Stone* v. *Federal Communications Commission,* 466 F.2d 316, 321-323 (C.A. D.C.); see *Columbus Broadcasting Coalition* v. *Federal Communications Commission,* 505 F.2d 320, 323-324 (C.A. D.C.).

The cases cited by petitioner do not support its contention that the Commission failed to fulfill its statutory obligation here. They address the Commission's obligation to conduct an investigation based on specific evidence presented, or under circumstances where the Commission has reason to believe that a hearing may develop evidence not in the possession of the complainant. See, *e.g., Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 425 F.2d 543, 546-547 (C.A. D.C.); *Clarksburg Publishing Co.* v. *Federal Communications Commission,* 225 F.2d 511, 515 (C.A. D.C.). This is not such a case. The only confirmed "adverse" information possessed by the Commission was that petitioner's principals had filed a private antitrust suit against the renewal applicants, and that the suit had been settled without any admission of liability (Pet. App. 15a). Those circumstances, standing

BLEED THROUGH

alone, were not sufficient to cause the Commission to believe that renewal would not serve the public interest. Petitioner's principals, who had possession of all the allegedly relevant information, refused, as the court of appeals pointed out, "to come forward with the information and, more important, made no effort to accept the FCC's recommended alternative of indicating which documents were protected and necessary for agency review" (Pet. App. 2a-3a). As the court emphasized, petitioner's refusal to identify the material it had in its possession did not even allow the Commission "some basis for belief that the damaging information did exist" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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